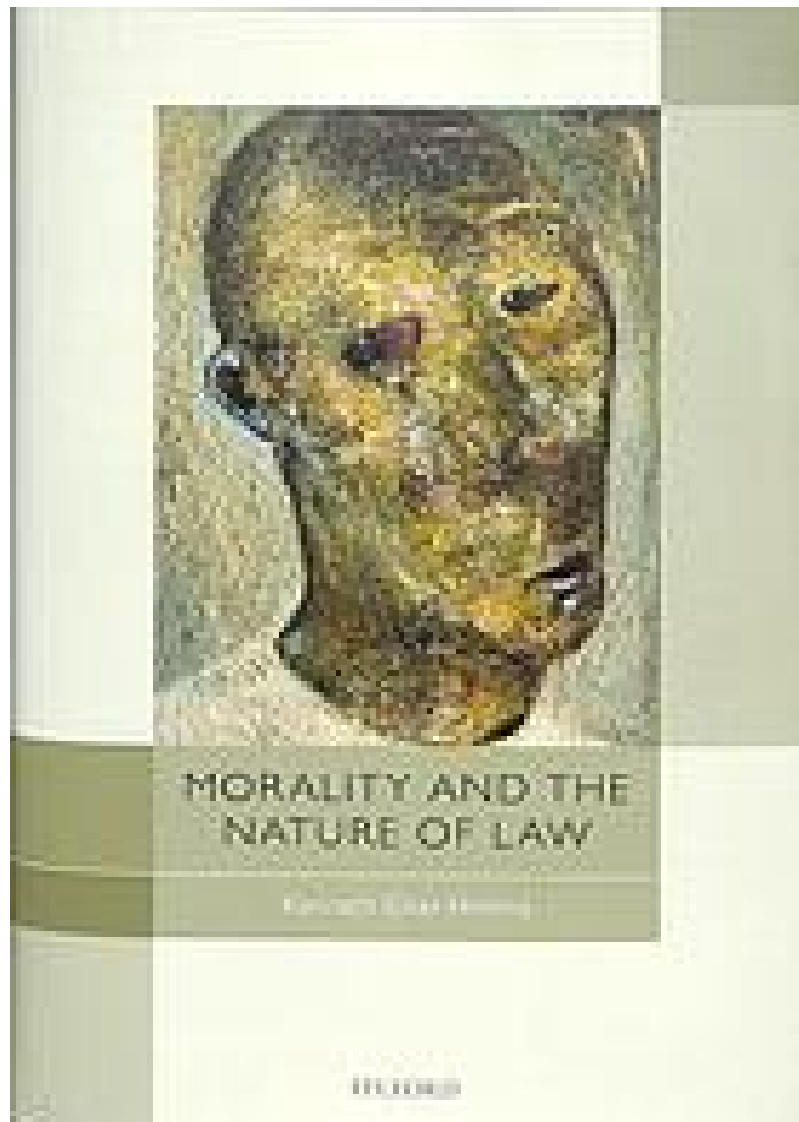


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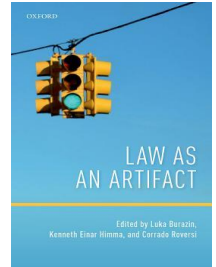


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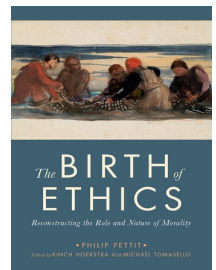
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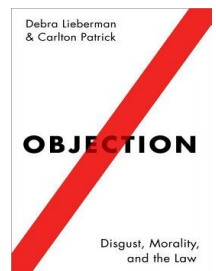
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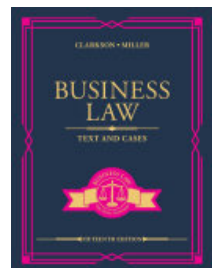
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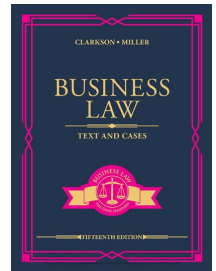
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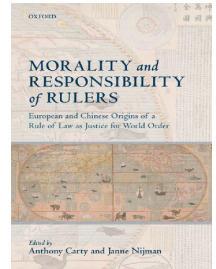
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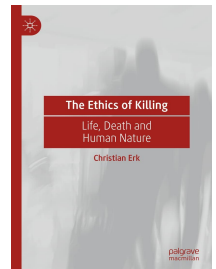
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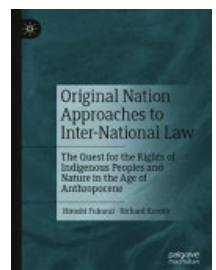
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MORALITY AND THE NATURE OF LAW

Kenneth Einar Himma

OXFORD

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KENNETH EINAR HIMMA

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This volume is dedicated to my mom, who has taught me more about courage, patience, honor, and kindness than anyone else. I have never known anyone who has faced so much adversity with so much grace and elegance. She is and will always be an inspiration to me.

Preface

This volume turned out to be quite different from what I had expected. When I first contemplated writing it, I thought that I would just take a number of previously published papers and do some minor edits to make them suitable as chapters of the volume. I figured that I would have to write no more than two new chapters, one introductory and the other purely expository, as I had previously published papers on the topics of all but two of the issues I had planned to address. Then I set about reading those papers with an eye toward revising them, and quickly realized that I had overestimated the quality of my published work. Each was riddled with errors that were so glaringly bad that I was appalled and embarrassed that I had published them.

It is important to be honest about one's mistakes, so I want to own them with the kind of public apology one hopes never to have to make: if you read these papers, I sincerely apologize for having wasted your time. From where I now sit, I think there were ideas worth developing in all of them, but I let them go much too quickly; as written, those papers were not worth reading. While there is nothing I can do to get them back, I believe that I have learned from my mistakes.

Obviously, I cannot claim that this volume is free from errors. What I can say is that I have spent much more time with each of these chapters than I spent on any of my previously published work. I have always felt uncomfortable imposing on others for detailed comments for various reasons; that has not changed and likely will not change. Even so, I am hopeful that the quality of the work here is significantly better than anything I have produced up to now.

That said, I would like to acknowledge the following people who have helped and encouraged me over the years: Matthew Adler, Larry Alexander, Brian Bix, Evgeny Borisov, David Brink, Carlos Bernal, Luka Burazin, Thomas Bustamante, André Coelho, Jules Coleman, Jennifer Corns, Jorge L. Fabra, Kenneth Ehrenberg, Imer B. Flores, John Gardner, Leslie Green, Mark Greenberg, Douglas Husak, Miodrag Jovanović, Nina Kaneda, Matthew Kramer, Massimo La Torre, C. Stephen Layman, Brian Leiter, Lucas Miotto, Adam Moore, Ronald Moore, Mark Murphy, Aleš Novak, Vitaly Ogleznev, Stephen Perry, Joseph Raz, Andrea Romeo, Corrado Roversi, Frederick Schauer, Stefan Sciaraffa, Scott Shapiro, Lawrence Solum, Bojan Spaić, Horacio Spector, Juan Pablo Sterling Casas, Noel Struchiner, Valeriy Surovtsev, William Talbott,

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Finally, I want to thank Maria Elias Sotirhos for everything that she has done for me over the nearly thirty years we have been together. She has been astoundingly supportive, as just about anyone who knows both of us can attest, putting up with more than any partner can reasonably be expected to put up with. Maria has painstakingly proofread every chapter of the book, despite utterly, unrelentingly, and, at times, loudly despising its topic. I cannot imagine how people go through life without the sort of unconditional love and kindness that she gives so naturally. I adore you, my boo.

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Introduction

What Do You Mean by “Law,” Anyway?

The notion of law that is typically the focus of conceptual jurisprudence applies to all and only institutional systems of norms; it is clearly part of the nature of law that it is institutional. As such, the concept-term “law” picks out paradigms of institutional systems of both municipal law and international law. These systems regulate different kinds of behavior: institutional systems of municipal law, as a conceptual matter, necessarily involve state regulation of both official and non-official behavior while institutional systems of international law necessarily involve multinational regulation of *only* official behavior on the part of nation-states. While it might be conceptually possible to have systems of international law that regulate non-official behavior, it is not conceptually necessary that they even purport to regulate non-official behavior.¹

But this general notion of law also applies to institutional normative systems that are like and unlike these legal systems in theoretically significant ways. Like systems of municipal and international law, a system of religious law has something fairly characterized as a rule of recognition for recognizing, applying, or enforcing norms that govern the behavior of members of the relevant community, as well as a set of authorized sanctions, such as ex-communication, reasonably contrived to induce compliance among subjects otherwise disposed to violate norms of the system. Unlike systems of municipal and international law, a system of religious law is necessarily concerned

¹ A federal system that brings together subnational entities into a unified national entity is somewhat more difficult to characterize. Conceived as conceptually independent of the subnational entities it unites, a federal legal system more resembles systems of international law than it does systems of municipal law in virtue of necessarily containing only norms governing the official behavior of the states. But conceived as conceptually dependent upon the subnational entities it brings together, it incorporates the law of those subnational entities and hence more resembles a municipal system than it does systems of international law.

with articulating, codifying, and enforcing a shared morality deemed to be the canon of the faith.

Although there is something to be gained in our understanding of law by explicating the content of a concept that applies to both systems of religious law and to systems of municipal and international law, there is also something to be lost. On the one hand, systems of religious law have much in common with systems of municipal and international law; that is why the term “law” can be taken to refer to both types of system. On the other hand, systems of religious law differ in theoretically significant ways from systems of municipal and international law. To pursue an explication of a general notion of law that applies equally to each will of necessity suppress theoretically significant features of one that distinguish it from the other and will hence result in a theory that under-explicates both.

Another potential drawback to focusing on a general notion that applies to both subtypes is that it can lead to confusion with respect to our understanding of each subtype. Consider H.L.A. Hart’s puzzling remarks about the conceptual function of law:

[W]hereas Dworkin’s interpretive legal theory in all its forms rests on the presupposition that the point or purpose of law and legal practice is to justify coercion, it certainly is not and never has been my view that law has this as its point or purpose. Like other forms of positivism my theory makes no claim to identify the point or purpose of law and legal practices as such; so there is nothing in my theory to support Dworkin’s view, which I certainly do not share that the purpose of law is to justify the use of coercion. In fact, I think it quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct.²

These remarks are usually interpreted as asserting that the conceptual function of law is to guide behavior, but a more careful look indicates that Hart is skeptical about the very possibility of identifying a distinctive conceptual function of law. It is not just that he states “[l]ike other forms of positivism, my theory makes no claim to identify the point or purpose of law and legal practices as such”; it is also that he thinks it “quite vain” to say anything more about law’s conceptual function than that it “provides guides to human conduct.”

Notice that the claim that law’s conceptual function is to guide behavior would not distinguish systems of municipal or international law from systems of religious law. Although both systems are concerned with doing something

² H.L.A. Hart, *The Concept of Law* 3rd Ed. (Oxford: Oxford University Press, 2012), 248–49. Hereinafter *CL*.

that involves guiding behavior through the governance of norms, legal norms and norms of religious law differ, as a conceptual matter, in content because they are concerned to achieve different things. In our world, municipal and international law seek to diminish the likelihood of violent conflicts among subjects so that they can reap the social benefits of living together in a community; the norms of religious law seek to enforce moral norms grounded in theological commitments that help to distinguish one faith tradition from another. If the concern is to explicate all of these various types of norm, all that can be said about law's conceptual function is that it is concerned to regulate behavior through norm-guidance.

But if the concern is to explicate our conceptual practices with respect to the nature of law as it applies to systems of municipal and international law, as I take it to be, the failure to distinguish municipal and international law from other systems of law is far from innocuous. The claim that the conceptual function of an automobile is to transport persons or things from one destination to another is problematic because it fails to distinguish automobiles from airplanes. Just as any conceptual theory of an automobile that fails to identify a conceptual function that distinguishes automobiles from airplanes is problematic for that reason, so is a conceptual theory of law that fails to identify a conceptual function that distinguishes systems of municipal and international law from other systems of law.

Pursuing an explication of the most general concept of law can lead to other confusions. If one refers to the rules of a chess association as "law," as the World Chess Federation (WCF) does, then it is utterly uncontentious that positivism's Separability Thesis is true; if any system of norms properly characterized as "law" is artifactual all the way down in the sense that the content of its norms is fully manufactured by its officials, the norms of a chess association are.³ Although there are good reasons to reject the conceptual claim that there can be no unjust laws, it would be silly to argue that the system of WCF rules suffices to establish the Separability Thesis and thereby to refute a view of historic importance that has been traditionally associated with classical natural law theory.

Although it is perfectly legitimate to pursue a conceptual theory that applies as much to chess and religious law as to municipal and international law, this is not the approach I take here. This volume is concerned exclusively with *jurisprudence* as the term is used among attorneys, judges, and law students. This usage is properly applied only to matters arising within systems of municipal law and international law. The approach here focuses, like most

³ *Handbook of the World Chess Federation*, available at <https://www.fide.com/component/handbook/?id=124&view=article>.

scholarly inquiries concerning the nature of law, on the practices associated with law as it pertains to political entities like states, but it assumes that these systems have a metaphysical nature that is related to but distinct from the nature of other kinds of systems of law.

None of this should be taken to deny that explicating the general concept that applies equally to municipal law, religious law, and the rules of a chess association is a worthwhile endeavor. The linguistic conventions we adopt define a conceptual framework that not only gives structure to the world of our experience but also says something important about us. An analysis of the more general concept of law hence conduces to our collective understanding of who we are and what we value. That our ordinary usages permit the application of the term “law” to systems that are as different from one another as municipal law, chess law, and religious law tells us something important about ourselves. But I have no urgent interest in the conceptual nature of chess law or religious law; what I do care a lot about is the nature of the type of law studied in law schools and practiced in systems of municipal and international law—and that is the exclusive concern of this volume.

There is one more feature of the approach adopted here that should be noted. I am of the view that the substance of a conceptual theory is deeply conditioned by the methodology that underwrites the analysis. The analysis is explicitly grounded in the linguistic and legal practices that inform our ordinary usage with respect to the term “law” and is exclusively concerned with that usage. The ultimate touchstone, then, for evaluating the claims I make about the concept of law is whether they conform to ordinary usage as fleshed out to expose not only the underlying social practices that define them but also the philosophical presuppositions that ground those practices.

Relationships Between Law and Morality

It is not implausible to think that the project of general jurisprudence was partly motivated by disputes about conceptual relationships between law and morality. Jeremy Bentham's and John Austin's legal positivism was articulated partly in response to William Blackstone's view that it is a conceptually necessary condition for a norm to count as law that its content not conflict with objective standards of justice. Bentham and Austin denied this claim, arguing instead that the content of the law is fully determined by the commands of a sovereign willing and able to back them with the threat of a sanction.¹

In this chapter, I distinguish three types of inquiry about law in order to explain the conceptual project with which this volume is concerned. Then I articulate the two conceptual views about morality and the nature of law that comprise the focus of this volume. First, I explain positivist and anti-positivist views with respect to whether it is a conceptual truth that the criteria of legal validity include moral constraints on the content of law. Second, I explain the dispute between inclusive and exclusive positivists with respect to whether it is conceptually possible for a legal system to have content-based moral criteria of validity.

Finally, as the intellectual legitimacy of the project of conceptual jurisprudence has recently come under fire for not having practical consequences or being "interesting" and hence as not being worth doing, I say something brief in defense of the project. My defense, such as it is, will be somewhat modest. I will dispute neither the claim that right answers to conceptual questions lack significant practical consequences nor the claim that conceptual theorizing is uninteresting.

What I will do is argue that the claim that conceptual jurisprudence should not be done is either unclear or false. On the one hand, if the claim that

¹ See, generally, Jeremy Bentham (1782). *Of Laws in General* Ed. H.L.A. Hart (London: Athlone Press, 1970); and John Austin (1832). *The Province of Jurisprudence Determined* Ed. Wilfred E. Rumble (Cambridge: Cambridge University Press, 1995). For an outstanding discussion of the history of these views, see Brian H. Bix, *Jurisprudence: Theory and Context* 7th Ed. (Durham, NC: Carolina Academic Press, 2015), Chapter 5. Hereinafter *JTC*.

conceptual jurisprudence should not be done is a moral claim, it is false. From the standpoint of morality, there are many things any legal scholar can do that would make the world a much better place than writing articles for academic journals; whatever difference there is between the moral value of writing in conceptual jurisprudence and that of writing in other areas of legal scholarship amounts to little. On the other hand, if it is not a moral claim, then it is not clear exactly what it amounts to.

1. Three types of inquiry about law

A frequent area of interest to those who theorize about law concerns the various relationships between law and morality. To understand these relationships, it is helpful to distinguish three kinds of inquiry concerning morality and law. The first is *empirical* in the sense that it is concerned with identifying certain contingent relationships in our world having to do with law and morality. One can ask, for example, whether officials of some existing legal system usually consider what they believe are moral requirements in making decisions about how to create, adjudicate, and enforce the law. As this question concerns the motivations of officials, addressing it requires going into the world and observing what officials say and how they behave in discharging their functions as officials.

The second kind of inquiry is *normative* in the sense that it is concerned with determining, as a matter of morality, how officials should behave in discharging their duties or what content the law should have. It is clear both that laws should be just and that legal systems should be legitimate; and the content of the law and legal practices should satisfy the appropriate moral requirements. Normative inquiry, then, is concerned with determining whether some existing law, legal system, or legal practice satisfies the relevant demands of morality.

The third kind of inquiry is *conceptual* in the sense that it seeks to describe the content of the relevant concept and hence to explicate the nature of the thing picked out by the concept. Conceptual claims purport to identify the properties that distinguish things that are members of the reference class of the concept-term from things that are not. For example, the concept-term “bachelor” is generally thought to apply only to things that are unmarried and men. The instantiation of all these properties distinguishes things that are bachelors from things that are not bachelors; married things, for example, do not fall within the reference class of the concept-term “bachelor.”

As traditionally conceived, the goal of conceptual analysis is purely descriptive. Thus conceived, the goal is simply to explicate, or describe in a philosophically rigorous way, the content of the relevant concept as it is grounded in those social practices that determine the application-conditions of the relevant concept-term. Conceptual analysis seeks to describe—rather than to prescribe—the content of the relevant concept and is hence concerned to provide an account of what the content of the concept *is*, and not of what the content of the concept *should be*.

Explicating the content of a concept requires identifying those properties that are conceptually necessary for something to fall under the concept in the following sense: if *p* is a conceptually necessary property for being an *A*, then it is conceptually impossible to be an *A* without instantiating *p*. To explicate the content of a concept is to identify those properties essential to the thing picked out by the corresponding concept-term. Being unmarried, for example, is a conceptually necessary condition for being a bachelor or, otherwise put, is essential to bachelorhood. Insofar as these conceptually necessary properties are essential properties of the thing picked out by the concept, they also define the *nature* of the thing picked out by the relevant concept.

As is evident from the talk of necessary properties, the traditional methodology for conceptual analysis trades in the language of modal logic, utilizing the modalities of necessity and possibility, along with possible-worlds talk. For example, the conceptual truth that bachelors are unmarried entails that there are no conceptually possible worlds in which there is someone who is both married and a bachelor. This latter claim is logically equivalent to the claim that in every conceptually possible world all bachelors are unmarried. Accordingly, conceptual inquiry with respect to the nature of law is concerned with determining what is true of law in some, none, or every conceptually possible world.

It is important to note that the character of the relevant modal claims about the nature of a thing depend on the logical relationship between the content of the concept and the linguistic conventions governing the use of the relevant concept-term. If, on the one hand, these modal claims presuppose a particular conceptual framework grounded in contingent linguistic practices, then the character of the resulting modal claims would aptly be described as “conditionally” necessary, and not as “absolutely” necessary, since the underlying practices can change over time. If, on the other, these modal claims are thought not to be grounded in the linguistic practices that establish the application-conditions for using the relevant concept-term, then the character of the resulting modal claims would aptly be described as “absolutely” necessary.

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Exploring the Variety of Random Documents with Different Content

Lord Salisbury, was not to be found in it, and he assured her that in future he would rule with a rod of iron—yet before he returned to his ordinary way of life he must have mislaid his list, for poor Dr. Burney remained at his post of organist of Chelsea Hospital. He never attained to the place which he coveted and for which his daughter was sent to five years' Royal servitude, and (incidentally) to achieve for herself that immortality as a chronicler which would certainly never have been won by her as a novelist.

But the King did not confine his conversation to the one topic which he knew was of greatest interest to her. He spoke of Mrs. Delany, who had been the means of introducing Fanny to the Royal circle; and he referred to the ill-treatment which he had received at the hands of one of his pages; but this was the only passage that savoured of unkindness, and the chronicler is unable to do more than hope that the conduct of the pages was one of His Majesty's delusions. Then, with what seems to us to be consummate adroitness, he put some questions to her which she could not but answer. "They referred to information given to him in his illness from various motives, but which he suspected to be false, and which I knew he had reason to suspect," Miss Burney writes. "Yet was it most dangerous to set anything right, as I was not aware what might be the views of their having been stated wrong. I was as discreet as I knew how to be, and I hope I did no mischief: but this was the worst part of the dialogue."

We can quite believe that it was, and considering that it was the part of the dialogue which was most interesting to the King, we think that Miss Burney was to be congratulated upon the tact she displayed in her answers. She did not cause the King to be more perturbed than he was when waxing indignant over the conduct of his pages; and there was no need for Dr. Willis to interfere at this point, though he did a little later on. Then submitting with the utmost docility to the control of his excellent attendant, and with another exhortation not to pay any attention to the whims of the Schwellenberg, the gracious gentleman kissed her once more on the cheek and allowed her to take her departure.

So ended this remarkable adventure in Kew Gardens. One can picture Fanny Burney flying to tell the Queen all that had occurred—to repeat everything that her discretion permitted her of the conversation; and one has no difficulty in imagining the effect upon Queen Charlotte of all that she narrated; but it seems rather hard that from Mrs. Schwellenberg should have been withheld the excellent advice given by the King to Miss Burney respecting the German virago.

It would have been impossible either for Fanny Burney or the Queen to come to any conclusion from all that happened except one that was entirely satisfactory to both. King George III was undoubtedly on the high road to recovery, and subsequent events confirmed this opinion. It really seemed that the interview with the author of *Evelina* marked the turning-point in his malady at this time. Every day brought its record of improvement, and within a fortnight the dreaded Regency Bill, which had been sent up to the Lords, was abandoned. On March 1st there were public thanksgivings in all the churches, followed by such an illumination of London as had not been seen since the great fire. The scene at Kew is admirably described by Miss Burney, who had written some congratulatory lines to be offered by the Princess Amelia to the King. A great “transparency” had been painted by the Queen's order, representing the King, Providence, Health, and Britannia—a truly British tableau—and when this was hung out and illuminated the little Princess “went to lead her papa to the front window.” Then she dropped on her knees and gave him the “copy of verses,” with the postscript:

The little bearer begs a kiss
From dear papa for bringing this.

The “dear papa” took his dear child in his arms, and held her close to him for some time. Nothing could have been more charmingly natural and affecting. For such a picture of Royalty at home we are

indebted to Fanny Burney, and, face to face with it, we are selfish enough to feel grateful to Dr. Burney for having given his daughter for five years to discharge a humble duty to her Sovereign and an immortal one to her fellow-countrymen, who have read her Diary and placed it on a shelf between Pepys and de Gramont.

A COMEDY IN ST. MARTIN'S STREET

DR BURNEY was giving a "command" party at his house in St. Martin's Street, Leicester Fields—the house which Sir Isaac Newton did once inhabit, and which was still crowned with the most celebrated observatory in Europe. In the early years of his musical career he had had a patron, Mr. Fulk Greville, who had done a great deal for him, and in later days he had never quite forgotten this fact, although Dr. Burney had climbed high on the professional as well as the social ladder, and was better known in the world than Mr. Greville himself. He had become quite intimate with many great persons and several curious ones. It is uncertain whether Mr. Greville regarded Dr. Johnson as belonging to the former or the latter class, but at any rate he had heard a great deal about Dr. Johnson, and did not think that, provided he took every reasonable precaution, any harm could come to himself from meeting such a notability. He accordingly instructed Dr. Burney to bring him and Johnson together, and Burney promised to do so. Before the day for this meeting was fixed Mrs. Greville—who, by the way, was Fanny Burney's godmother—had signified her intention of viewing the huge person also, and of bringing her daughter, the exquisite Mrs. Crewe, to attend the promised exhibition of genius in bulk.

Of course Dr. Johnson was ready to lend himself to any plan that might be devised to increase the circumference of his circle of admirers, and besides, this Mr. Fulk Greville was a descendant of the friend of Sir Philip Sidney, and had large possessions, as well as a magnificent country seat, and altogether he would make a most desirable listener; so he agreed to come to the party to be inspected by the Greville family. Burney, however, wishing, as every responsible proprietor of a menagerie should wish, to be on the safe side and exhibit his bear under the eye and the controlling influence of his favourite keeper, invited Mr. and Mrs. Thrale to the party.

These were to be the "principals" in the comedy of this entertainment; and for the subordinates he selected his married daughter and her husband—both admirable musicians—Mr. Davenant, Mr. Seward, and a certain Italian musician, a vocalist as well as a performer on the violin and that new instrument which was at first called the fortepiano, then the pianoforte, and later on simply the piano. This person's name was Gabrielli Piozzi.

Such were the harmonious elements which Dr. Burney proposed to bring together for the gratification of Mr. Fulk Greville and his wife. Mr. Greville was an amateur of some little capacity, and he had certainly at one time been greatly interested in music. He had paid £300 to Burney's master, the celebrated Dr. Arne, who composed in the masque of "Alfred" the rousing anthem known as "Rule Britannia," for the cancelling of Burney's indentures as an apprentice to the "art of musick," and had taken the young man into his own house in a capacity which may best be described as that of entertaining secretary. Dr. Burney may therefore have thought in his wisdom that, should Johnson be in one of his bearish moods and feel disinclined to exhibit his parts of speech to Mr. Greville, the latter would be certain of entertainment from the musicians. This showed forethought and a good working knowledge of Dr. Johnson. But in spite of the second string to the musician's bow the party was a fiasco—that is, from the standpoint of a social entertainment; it included one incident, however, which made it the most notable of the many of the Burney parties of which a record remains.

And what records there are available to any one interested in the entertainments given by Dr. Burney and his charming family at that modest house of theirs, just round the corner from Sir Joshua Reynolds' larger establishment in Leicester Fields! Hundreds of people who contributed to make the second half of the eighteenth century the most notable of any period so far as literature and the arts were concerned, since the spacious days of Elizabeth, were accustomed to meet together informally at this house, and to have their visits recorded for all ages to muse upon. To that house came Garrick, not to exhibit his brilliance as a talker before a crowd of

admirers, but to entertain the children of the household with the buffooning that never flagged, and that never fell short of genius in any exhibition. He was the delight of the schoolroom. Edmund Burke and his brother, both fond of conversation when oratory was not available, were frequently here; Reynolds came with many of his sitters, and found fresh faces for his canvas among his fellow-guests; and with him came his maiden sister, feeling herself more at home with the simple Burney circle than she ever did with the company who assembled almost daily under her brother's roof. Nollekens, the sculptor; Colman, the dramatist and theatre manager, who was obliged to run away from London to escape the gibes which were flung at him from every quarter when Goldsmith's *She Stoops to Conquer*, which he had done his best to make a failure, became the greatest success of the year; Cumberland, the embittered rival of Goldsmith, who was the person who gave the solitary hiss during the first performance of the same play, causing the timid author to say to the manager on entering the playhouse, "What is that, sir—pray, what is that? Is it a hiss?" To which Colman replied, "Psha! sir, what signifies a squib when we have been sitting on a barrel of gunpowder all night?"

These were among the notabilities; and the "curiosities" were quite as numerous. The earliest of Arctic voyagers, Sir Constantine Phipps, who later became Lord Mulgrave, put in an appearance at more than one of the parties; and so did Omai, the "gentle savage" of the poet Cowper, who was brought by Captain Cook from the South Seas in the ship on which young Burney was an officer. The sisters, who, of course, idolised the sailor, sat open-mouthed with wonder to hear their brother chatting away to Omai in his native language. Upon another occasion came Bruce, the Abyssinian traveller, who told the story of how steaks were cut from the live ox when needed by the inhabitants of one region. He was immensely tall, as were some of his stories; but though extremely dignified, he did not object to a practical joke. Another person of great stature who visited the Burneys was the notorious Count Orloff, the favourite of the Empress Catherine of Russia; and from the letters of

one of the young people of the household one has no difficulty in perceiving with what interest he was regarded by the girls, especially since the report reached them that he had personally strangled his imperial master at the instigation of his imperial mistress.

These are but, a few names out of the many on the Burneys' visiting list. Of course, as regards musical artists, the house was the rendezvous of the greatest in London. While the opera-house in the Haymarket was open there was a constant flow of brilliant vocalists to these shores, and the young people had many opportunities of becoming acquainted with the ignorance, the capriciousness, the affectations, and the abilities which were to be found associated with the lyric stage in the eighteenth century, as they are in the twentieth. Among the prime donne who sang for the Burneys were the Agujari—a marvellous performer, who got fifty pounds for every song she sang at the Pantheon—and her great but uncertain rival, Gabrielli. The former, according to Mozart, who may possibly be allowed to be something of a judge, had a vocal range which was certainly never equalled by any singer before or after his time. She won all hearts and a great deal of money during her visit to London, and she left with the reputation of being the most marvellous and most rapacious of Italians. Gabrielli seems to have tried to make up by capriciousness what she lacked in expression. Her voice was, so far as can be gathered from contemporary accounts, small and thin. But by judiciously disappointing the public she became the most widely talked of vocalist in the country. Then among the men were the simple and gracious Pacchierotti—who undoubtedly became attached to Fanny Burney—Rauzzini, and Piozzi.



The Burneys' house was for years the centre of the highest intellectual entertainment to be found in London, and the tact of the head of the household, and the simple, natural manners of his daughters, usually succeeded in preventing the intrusion of a single inharmonious note, in spite of the fact that a Welsh harpist named Jones had once been among the visitors.

But upon the occasion of this "command" party, when Greville was to meet Johnson, and the latter had dressed himself with that extreme care which we suspect meant that he tied up his hose, and put on a wig the front of which had not yet been burnt away by coming in contact with his lighted candle, Burney's tact overreached itself. Mr. Greville may have felt that the Thrales had no business to be of the party, or Johnson may have gained the impression that Burney's old patron was anxious to play the same part, in an

honorary sort of way, in regard to himself. At any rate, he refused to be drawn out to exhibit his conversational powers to a supercilious visitor; and after a brief space of time he turned his back upon every one and his face to the fire, and there he sat, greatly to the discomfiture, no doubt, of his host. In a very short time a gloom settled down upon the whole party. Mr. Thrale, stiff and reserved, was not the man to pull things together. He sat mute on his chair, making no advance toward Mr. Greville, and Mr. Greville had probably his chin in the air, having come to the conclusion that Dr. Johnson's powers as a conversationalist had been greatly overrated by rumour.

It was when all hope of sociability had vanished that Dr. Burney, who, when a church organist, may have had occasion to cover up the shortcomings of the clergyman by a timely voluntary, begged Signor Piozzi to oblige the company with a song. But Piozzi was a forlorn hope. He was the last man in the world to save the situation. Had he been a vocalist of the calibre of Pacchierotti he could have made no headway against the funereal gloom that had settled down upon the party.

Piozzi had a sweet and highly trained voice, though some years earlier he had lost its best notes, and he sang with exquisite expression; but when playing his own accompaniment, with his back turned to his audience, he was prone to exaggerate the sentiment of the music until sentiment became lost in an exuberance of sentimentality.

This style of singing is not that to which any one would resort in order to dissipate a sudden social gloom. As the singer went on the gloom deepened.

It was just at this moment that one of those ironic little imps that lurk in wainscot nooks looking out for an opportunity to influence an unconscious human being to an act which the little demon, seeing the end of a scene of which mortals only see the beginning, regards with sardonic glee, whispered something in the ear of Mrs. Thrale, and in an instant, in obedience to its prompting, she had left her chair and stolen behind the singer at the piano. Raising her hands

and turning up her eyes in imitation of Piozzi, she indulged in a piece of mimicry which must have shocked every one in the room except the singer, who had his back to her, and Dr. Johnson, who, besides being too short-sighted to be able to see her, was gazing into the grate.

No doubt the flippant little lady felt that a touch of farcical fun was the very thing needed to make the party go with a snap; but such flagrant bad taste as was involved in the transaction was more than Dr. Burney could stand. Keeping his temper marvellously well in hand, considering his provocation, he went gently behind the gesticulating woman and put a stop to her fooling. Shaking his head, he whispered in a "half joke whole earnest" way:

"Because, madam, you have no ear yourself for music, will you destroy the attention of all who, in that one point, are otherwise gifted?"

Or words to that effect, it might be safe to add, for the phrases as recorded in the diary of one of his daughters are a trifle too academic for even Dr. Burney to have whispered on the spur of the moment. But he certainly reproved the lady, and she took his remonstrance in good part, and showed herself to be admirably appreciative of the exact pose to assume in order to save the situation. She went demurely to her chair and sat there stiffly, and with the affectation of a schoolgirl who has been admonished for a fault and commanded to take a seat in silence and apart from the rest of the class. It must be apparent to every one that this was the precise attitude for her to strike in the circumstances, and that she was able to perceive this in a rather embarrassing moment shows that Mrs. Thrale was quite as clever as her friends made her out to be.

But regarding the incident itself, surely the phrase, "the irony of fate," was invented to describe it. A better illustration of the sport of circumstance could not be devised, for in the course of time the lively little lady, who had gone as far as any one could go in making a mock of another, had fallen as deep in love with the man whom she mocked as ever Juliet did with her Romeo. She found that she

could not live without him, and, sacrificing friends, position, and fortune, she threw herself into his arms, and lived happy ever after.

The conclusion of the first scene in this saturnine comedy which was being enacted in the drawing-room in that house in St. Martin's Street, was in perfect keeping with the *mise-en-scène* constructed by Fate, taking the rôle of Puck. It is admirably described in the diary of Charlotte Burney. She wrote that Mr. Greville—whom she nicknamed "Mr. Gruel"—assumed "his most supercilious air of distant superiority" and "planted himself immovable as a noble statue upon the hearth, as if a stranger to the whole set."

By this time Dr. Johnson must have had enough of the fire at which he had been sitting, and we at once see how utterly hopeless were the social relations at this miserable party when we hear that the men "were so kind and considerate as to divert themselves by making a fire-screen to the whole room." But Dr. Johnson, having thoroughly warmed himself, was now in a position to administer a rebuke to the less fortunate ones, and, when nobody would have imagined that he had known the gentlemen were in the room, he said that "if he was not ashamed he would keep the fire from the ladies too."

"This reproof (for a reproof it certainly was, although given in a very comical, dry way) was productive," Charlotte adds, "of a scene as good as a comedy, for Mr. Suard tumbled on to a sofa directly, Mr. Thrale on to a chair, Mr. Davenant sneaked off the premises, seemingly in as great a fright and as much confounded as if he had done any bad action, and Mr. Gruel being left solus, was obliged to stalk off."

A more perfect description of the "curtain" to the first act of this, "as good as a comedy," could not be imagined. In every scene of this memorable evening the mocking figure of an impish Fate can be discerned. There was the tactful and urbane Dr. Burney anxious to gratify his old patron by presenting to him the great Dr. Johnson, and at the same time to show on what excellent terms he himself was with the family of the wealthy brewer, Mr. Thrale. Incidentally he has caused Johnson to put himself to the inconvenience of a clean

shirt and a respectable wig; and, like a thoughtful general, lest any of his plans should fall short of fulfilment, he has invited an interesting vocalist to cover up the retreat and make failure almost impossible!

Dr. Burney could do wonders by the aid of his tact and urbanity, but he is no match for Fate playing the part of Puck. Within an hour Johnson has disappointed him and become grumpy—the old bear has found the buns to be stale; Mr. Greville, the patron, is in a patronising mood, and becomes stiff and aloof because Johnson, secure with his pension, resents it; Mrs. Thrale, anxious to do her best for Burney, and at the same time to show Mrs. Greville and her fine daughter how thoroughly at home she is in the house and how delicate is her sense of humour, strikes an appallingly false note, and only saves herself by a touch of cleverness from appearing wholly ridiculous. This is pretty well for the opening scenes, but the closing catastrophe is not long delayed. The men huddle themselves together in stony silence; and they are reproved for impoliteness by—whom? Dr. Johnson, the man who has studied boorishness and advanced it to a place among the arts—the man who calls those who differ from him dolts and fools and rascals—the man whose manners at the dinner table are those of the sty and trough—the man who walks about the streets ungartered and unclean—this is the man who has the effrontery to rebuke for their rudeness such gentlemen as Mr. Fulk Greville, Mr. Seward, and Mr. Thrale! Puck can go no further. Down comes the curtain when one gentleman collapses upon a “sopha,” another into a chair, a third sneaks off like a culprit, and the fourth stalks off with an air of offended dignity!

It might be thought that the imp of mischief who had assumed the control of this evening's entertainment would be satisfied at the result of his pranks so far. Nothing of the sort. He was only satisfied when he had made a match between the insignificant figure who was playing the musical accompaniment to his pranks and the lady who thought that his presence in the room was only justifiable on the ground that he made an excellent butt for her mockery!

And the funniest part of the whole comedy is to be found in the fact that the pair lived happy ever after!

The extraordinary influence which Boswell has had upon almost every student of the life of the latter half of the eighteenth century is shown in a marked way by the general acceptance of his view—which it is scarcely necessary to say was Johnson's view—of the second marriage of Mrs. Thrale. We are treating Boswell much more fairly than he treated Mrs. Thrale when we acknowledge at once that his opinion was shared by a considerable number of the lady's friends, including Dr. Burney and his family. They were all shocked when they heard that the widow of the Southwark brewer had married the Italian musician, Signor Gabrielli Piozzi. Even in the present day, when one might reasonably expect that, the miserable pettiness of Boswell's character having been made apparent, his judgment on most points would be received with a smile, he is taken very seriously by a good many people. It has long ago been made plain that Boswell was quite unscrupulous in his treatment of every one that crossed his path or made an attempt to interfere with the aim of his life, which was to become the biographer of Johnson. The instances of his petty malevolence which have come to light within recent years are innumerable. They show that the opinion which his contemporaries formed of him was absolutely correct. We know that he was regarded as a cur who was ever at Johnson's heels, and took the insults of the great man with a fawning complacency that was pathetically canine. He was daily called a cur. "Oh, no," said Goldsmith, "he is not a cur, only a burr; Tom Davies flung him at Johnson one day as a joke, and he stuck to him ever since"—a cur, and an ape and a spy and a Branghton—the last by Dr. Johnson himself in the presence of a large company, that included the creator of the contemptible Mr. Branghton. (The incident was not, however, recorded by Mr. Boswell himself.) But as the extraordinary interest in his *Life of Johnson* began to be acknowledged, the force of contemporary opinion gradually dwindled away, until Boswell's verdicts and Boswell's inferences found general acceptance; and even now Goldsmith is regarded as an Irish *omadhaum*, because

Boswell did his best to make him out to be one, and Mrs. Thrale is thought to have forfeited her claims to respect because she married Signor Piozzi.

People forget the origin of Boswell's malevolence in both cases. He detested Goldsmith because Goldsmith was a great writer, who was capable of writing a great biography of Johnson, with whom he had been on the most intimate terms long before Tom Davies flung his burr at Johnson; he hated Baretti and recorded—at the sacrifice of Johnson's reputation for humanity—Johnson's cynical belittling of him, because he feared that Baretti would write *the* biography; he was spiteful in regard to Mrs. Thrale because she actually did write something biographical about Johnson.

The impudence of such a man as Boswell writing about “honest Dr. Goldsmith” is only surpassed by his allusions to the second marriage of Mrs. Thrale. He was a fellow-guest with Johnson at the Thrales' house in 1775, and he records something of a conversation which he says occurred on the subject of a woman's marrying some one greatly beneath her socially. “When I recapitulate the debate,” he says, “and recollect what has since happened, I cannot but be struck in a manner that delicacy forbids me to express! While I contended that she ought to be treated with inflexible steadiness of displeasure, Mrs. Thrale was all for mildness and forgiveness and, according to the vulgar phrase, making the best of a bad bargain.” This was published after the second marriage. What would be thought of a modern biographer who should borrow a little of Boswell's “delicacy,” and refer to a similar incident in the same style?

In his own inimitable small way Boswell was for ever sneering at Mrs. Thrale. Sometimes he did it with that scrupulous delicacy of which an example has just been given; but he called her a liar more than once with considerable indelicacy, and his readers will without much trouble come to the conclusion that his indelicacy was preferable to his delicacy—it certainly came more natural to him. He was small and mean in all his ways, and never smaller or meaner than in his references to Mrs. Thrale's second marriage.

But, it must be repeated, he did not stand alone in regarding her union with Piozzi as a *mésalliance*. Dr. Burney was shocked at the thought that any respectable woman would so far forget herself as to marry a musician, and his daughter Fanny wept remorseful tears when she reflected that she had once been the friend of a lady who did not shrink from marrying a foreigner and a Roman Catholic—more of the irony of Fate, for Fanny Burney was herself guilty of the same indiscretion later on: she made a happy marriage with a Roman Catholic foreigner, who lived on her pension and her earnings. Dr. Johnson was brutal when the conviction was forced upon him that he would no longer have an opportunity of insulting a lady who had treated him with incredible kindness, or the guests whom he met at her table. Upon one of the last occasions of his dining at Mrs. Thrale's house at Streatham, a gentleman present—an inoffensive Quaker—ventured to make a remark respecting the accuracy with which the red-hot cannon-balls were fired at the Siege of Gibraltar. Johnson listened for some time, and then with a cold sneer said, "I would advise you, sir, never to relate this story again. You really can scarce imagine how very poor a figure you make in the telling of it." Later on he took credit to himself for not quarrelling with his victim when the latter chose to talk to his brother rather than to the man who had insulted him. Yes, it can quite easily be understood that Johnson should look on the marriage as a sad *mésalliance*, and possibly it is fair to assume from the letter which he wrote to the lady that he felt hurt when he heard that it was to take place.

Mrs. Thrale wrote to tell him that she meant to marry Piozzi, and received the following reply:

"Madam,—If I interpret your letter right, you are ignominiously married; if it is yet undone, let us once more talk together. If you have abandoned your children and your religion, God forgive your wickedness; if you have forfeited your fame and your country, may your folly do no further mischief!"

Possibly the lady may have gathered from the hint or two conveyed to her, with Boswellian delicacy, in this letter, that Johnson

was displeased with her. At any rate, she replied, declining to continue the correspondence.

In her letter she summed up the situation exactly as a reasonable person, acquainted with all the facts, and knowing something of the first husband, would do.

"The birth of my second husband is not meaner than that of my first," she wrote; "his sentiments are not meaner; his profession is not meaner; and his superiority in what he professes acknowledged by all mankind. It is want of fortune, then, that is ignominious; the character of the man I have chosen has no other claim to such an epithet. The religion to which he has always been a zealous adherent, will, I hope, teach him to forgive insults he has not deserved; mine will, I hope, enable [me] to bear them at once with dignity and patience. To hear that I have forfeited my fame is indeed the greatest insult I ever yet received. My fame is as unsullied as snow, or I should think it unworthy of him who must henceforth protect it."

This brought the surly burly mass of offended dignity to his proper level; but still he would not offer the lady who had been his benefactress for twenty years an apology for his brutality. He had the presumption to offer his advice instead—advice and the story (highly appropriate from his point of view) of Mary Queen of Scots and the Archbishop of St. Andrews. He advised her to remain in England—he would not relinquish his room in her house and his place at her table without a struggle—as her rank would be higher in England than in Italy, and her fortune would be under her own eye. The latter suggestion was a delicate insult to Piozzi.

Mrs. Piozzi, as she then became, showed that she esteemed this piece of presumption, under the guise of advice, at its true value. Immediately after her marriage she went abroad with her husband, though eventually she settled with him in England.

Now, most modern readers will, we think, when they have become acquainted with the whole story of Mrs. Thrale's life, arrive at the

conclusion that it was her first marriage that was the *mésalliance*, not her second.



Henry Thrale was a man of humble origin—a fact that revealed itself almost daily in his life—and he was incapable of loving any one except himself. He certainly never made a pretence of devotion to his wife, and it is equally certain that, although she did more for him than any other woman would have done, she never loved him. It might be going too far, considering the diversity of temperament existing among womankind, to assert that he was incapable of being loved by any woman; but beyond a doubt he was not a lovable man. He was a stiff, dignified, morose, uncongenial man, and he was a Member of Parliament into the bargain. What could a pretty, lively, brilliant girl of good family see in such a man as Thrale to make her

love him? She never did love him—at times she must have detested him. But she married him, and it was a lucky day for him that she did so. Twice she saved him from bankruptcy, and three times she induced his constituents, who thoroughly hated him, to return him to Parliament as their representative. He never did anything in Parliament, and he did little out of it that was worth remembering. It is customary to make large allowances for a man of business who finds that his wealth and a charming wife serve as a passport into what is called society, though latterly such men do not stand in need of such a favour being shown to them. But if a man betrays his ignorance of certain social usages—not necessarily refinements—his friends excuse him on the ground that he is a first-rate business man. Thrale, however, was unworthy of such a title. He inherited a great scientific business, but he showed himself so incapable of appreciating the methods by which it had been built up, that he brought himself within a week or two of absolute ruin by listening to a clumsy adventurer who advocated the adoption of a system of adulteration of his beer that even a hundred and fifty years ago would have brought him within sight of a criminal prosecution.

His literary wife, by her clever management, aided by the money of her mother and of sundry of her own, not her husband's, friends, succeeded in staving off the threatened disaster. But the pig-headed man did not accept the lesson which one might imagine he would have learned. Seeing the success that crowned other enterprises of the same character as his own, he endeavoured to emulate this success, not by the legitimate way of increasing his customers, but by the idiotic plan of over-production. He had an idea that in the multiplying of the article which he had to sell he was increasing his business. Once again he was helped from the verge of ruin by his literary wife.

He must have been a dreadful trial to her, and to a far-seeing manager whom he had—a man named Perkins. Of course it was inevitable that the force of character possessed by this Mr. Perkins must eventually prevail against the dignified incompetence of the proprietor. The inevitable happened, and the name of Perkins has for

more than a hundred years been bracketed with Barclay as a going concern, while the name of Thrale has vanished for ever from "the Borough."

It was this Mr. Perkins who, when the brewery was within five minutes of absolute disaster, displayed the tactics of a great general in the face of an implacable enemy, and saved the property. As a reward for his services his master authorised the presentation to him of the sum of a hundred pounds. His master's wife, however, being a more generous assessor of the value of the man's ability, ventured to present double the sum, together with a silver tea-service for Mrs. Perkins; but she did so in fear and trembling, failing to summon up sufficient courage to acquaint her husband with her extravagance until further concealment was impossible. She was so overjoyed at his sanctioning the increase that she at once wrote to her friends acquainting them with this evidence of his generosity.

This episode was certainly the most stirring in the history of Thrale's brewery. The Gordon rioters had been terrorising London for several days, burning houses in every direction, as well as Newgate and another prison, and looting street after street. They had already overthrown one brewery, and they found the incident so fascinating that they marched across the bridge to the Southwark concern, raising the cry that Thrale was a Papist. The Thrales were at this time sojourning at Bath, and were in an agony of suspense regarding their property. They had left Dr. Johnson comfortably ensconced at their Streatham house in order that they might learn in dignified language how things were going on.

This is Johnson's thrilling account of the incident:

"What has happened to your house you all know. The harm is only a few butts of beer, and I think you may be sure that the danger is over. Pray tell Mr. Thrale that I live here, and have no fruit, and if he does not interpose am not likely to have much; but I think he might as well give me a little as give all to the gardener."

There was a double catastrophe threatening, it would appear: the burning of the brewery and the shortage in the supply of Dr.

Johnson's peaches.

This is how Mrs. Thrale describes the situation:

"Nothing but the astonishing presence of mind shewed by Perkins in amusing the mob, with meat and drink and huzzas, till Sir Philip Jennings Clerke could get the troops, and pack up the counting-house, bills, bonds etc. and carry them, which he did, to Chelsea College for safety, could have saved us from actual undoing. The villains *had* broke in, and our brew-house would have blazed in ten minutes, when a property of £150,000 would have been utterly lost, and its once flourishing possessors quite undone."

It seems almost incredible that Johnson, living at Streatham as the guardian of Mr. Thrale's interests, should require the lady to write to him, begging him to thank Perkins for his heroism. But so it was.

"Perkins has behaved like an Emperor," she wrote, "and it is my earnest wish and desire—command, if you please to call it so—that you will go over to the brew-house and express *your* sense of his good behaviour."

Mrs. Thrale was unreasonable. How could Johnson be expected to take any action when he was deprived of his peaches?

It will strike a good many modern readers of the account of this and other transactions that if it was Perkins who saved the brewery for Mr. Thrale, it was Mrs. Thrale who saved Perkins for the brewery. Possibly it was her prompt gift of the silver plate to Mrs. Perkins that induced this splendid manager to pocket the insult of the beggarly two hundred guineas given to him by Mrs. Thrale—though this was double the amount authorised by the "master." Thrale never sufficiently valued the services of Perkins. If he had had any gratitude in his composition he would never have made Johnson one of his executors. What a trial it must have been to the competent man of business to see Johnson lumbering about the place with a pen behind his ear and an ink-pot suspended from a button of his coat, getting in the way of everybody, and yet feeling himself quite equal to any business emergency that might crop up. He felt himself equal to anything—even to improve upon the auctioneer's style in

appraising the value of the whole concern. "Beyond the dreams of avarice" remains as the sole classic phrase born beneath the shadow of a brew-house.

In the matter of the premium to Perkins, Thrale should have felt that he had a treasure in his wife, to say nothing of all that she had done for him upon another occasion, involving a terrible sacrifice. A quarrel had broken out among the clerks at the brewery, which even the generalship of Perkins was unable to mollify. Had Mrs. Thrale been an ordinary woman she would not have jeopardised her own life and the life of her child—her thirteenth—in her husband's interests. As it was, however, she felt that the duty was imposed on her to settle the difficulties in the counting-house, and she did so; but only after many sleepless nights and the sacrifice of her child. "The men were reconciled," she wrote, "and my danger accelerated their reconciliation."

If Henry Thrale was deficient in the best characteristics of a business man, his qualifications to shine socially can scarcely be regarded as abundant. There were stories of his having been a gay dog in his youth, but assuredly he and gaiety had long been strangers when he married his wife, and upon no occasion afterwards could he be so described even by the most indulgent of his friends; so that one rather inclines to the belief that the dull dog must have been a dull puppy. We know what his eldest daughter was, and we are convinced that the nature of that priggish, dignified, and eminently disagreeable young lady was inherited from her father. In Miss Thrale as a girl one feels that one is looking at Henry Thrale as a boy. The only story that survives of those mythical gay days with which he was accredited is that relating to the arrival of the Gunnings to take London by storm. It was said that he and Murphy thought to make these exquisite creatures the laughing-stock of the town by introducing them to a vulgar hanger-on of Murphy, in the character of a wealthy man of title and distinction. Possibly the two young men were put up to play this disgraceful prank upon the Gunnings by some jealous female associate; but however this may be, it not only failed most ignominiously, it

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